CIMB BANK BHD v. JARING COMMUNICATIONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[COMPANIES (WINDING-UP) NO: 28NCC-843-11-2014]
3 AUGUST 2016

COMPANY LAW: *Directors – Breach of fiduciary duties – Company wound-up – Misapplication of company's money by director of company – Payments to various individuals and companies – Whether contractual documents produced – Whether payments authorised by board's resolution – Payments made post date of petition – Whether validated by court – Whether payments post commencement of winding-up void – Whether director breached duties as director and fiduciary of company – Companies Act 1965, ss. 132(1), (2), 133, 133A, 223, 305*

COMPANY LAW: *Liquidators – Powers of – Action under s. 305 of Companies Act 1965 ('CA') against director of company – Whether director committed misfeasance and breached duty to company – Whether liquidators entitled to exercise powers under s. 236(2)(a) of CA – Whether adherence to s. 226(1) and (2) of CA by a petitioner sine qua non for institution of action under s. 305 – Whether winding-up order a nullity*

Premised on a petition filed by the petitioner, the respondent ('the company') was wound up. Its appointed liquidators sought the court's intervention to declare that one Dato' Norhisam, who was at the material time a director of the company, guilty of misfeasance and breach of fiduciary duty for misapplication of the funds of the company. The liquidators sought to recover the monies which was authorised by Dato' Norhisam to be paid to: (a) Utusan Printcorp Sdn Bhd; (b) himself; (c) his sister, Nurhaslina; (d) his sister, Nurhaliza; (e) his driver, Mohd Shabri; and (f) Eye Consolidated Sdn Bhd. The liquidators thus filed an application under ss. 305 and 223 of the Companies Act 1965 ('CA') and pursuant to the inherent jurisdiction of the court for orders, *inter alia*, that Dato' Norhisam is guilty of misfeasance and breach of fiduciary and other duties in respect of the alleged misapplication of the money of company and a consequential order for repayment of the company funds. Dato' Norhisam raised several preliminary objections, *inter alia* (i) the liquidators had failed to show that the petitioner had complied with the mandatory requirements in s. 226(1) and (2) of the CA; and (ii) wrong mode of originating process was used wherein the proceedings must be begun by a writ action.

Held (allowing encl. 79 with costs):

(1) It is an unfortunate misapprehension of the law to contend that adherence by a petitioner to s. 226(1) and (2) is a *sine qua non* for the institution of an action under s. 305 by a liquidator. The validity of both the appointment of a liquidator and the exercise of his powers are

in no way affected by the question of whether or not the petitioner is in compliance with s. 226(1) and (2). Non-compliance may well result in the petitioner being found guilty of an offence, but it does not render the winding up order a nullity. Hence, the preliminary objection concerning the alleged non-compliance with s. 226(1) and (2) by the petitioner was entirely bereft of substance and must necessarily fail. (paras 12-14)

(2) The summons herein represented the proper procedure. There were no real, credible or genuine disputes of fact to justify the court to consider converting this application into a writ action. The allegations made by the liquidators against Dato' Norhisam was patently specific and straightforward and neither had Dato' Norhisam proffered any grounds or evidence that can meaningfully be characterised as constituting an effective riposte to dispute any of the said allegations of breaches of fiduciary duties and misfeasance against him. The action brought by the liquidators was primarily premised on s. 305 of the CA, which was not dependant on the applicant proving fraud against the director in question. It is sufficient to prove that the director had committed misfeasance or acted in breach of his duty to the company. (paras 19, 22, 27 & 28)

(3) The consent of the liquidators for Dato' Norhisam to affirm his affidavit on behalf of the company was not necessary as the affidavits were affirmed by Dato' Norhisam in his individual and personal capacity. Further, the liquidators were fully entitled to exercise their powers under s. 236(2)(a) of the CA and had thus acted within their powers to institute the action on behalf of the company against a director of the company. When a director, in violation of his statutory and fiduciary duty, diverts company funds to a third party, an action to sue the director for the breach, and another proceeding against the third party for the return of the funds, could not amount to a duplicity of proceedings. Therefore, the preliminary objections raised were bereft of any substance and misconceived. (paras 31-34)

(4) There was total absence of any documentary evidence such as a board resolution which could support the assertion that the company agreed to invest or, for any reason, provide funds to Utusan Printcorp. There was no contractual document governing the relationship between the company and Utusan Printcorp in respect of the purported investment or short term loan. This justified a finding that the director in question had breached s. 132(1) and (2) of the CA, in turn, providing the requisite basis to find him guilty of misfeasance under s. 305 of the CA. Even if the advances were made to the company's own sole shareholder, it did not change the fact that the reasons for such payments were wholly unjustified. (paras 37-39)

(5) Dato' Norhisam made various payments post the date of the petition, and there was no evidence that any of such payments had been validated by the court. As such, it was clear that the payments made after the commencement of winding up was void by virtue of s. 223 of the CA and action may be taken against him. The fact that Dato' Norhisam was a common director of the payer and payee of the funds of the company also signified a clear conflict of interest. Therefore, a clear case of misapplication of the company funds, misfeasance and breach of the directors' fiduciary and statutory duties on the part of Dato' Norhisam was established. (paras 44, 45, 49 & 50)

(6) The act of authorising advances and purported loans made to himself by Dato' Norhisam was a blatant infringement of his statutory and fiduciary duties, in addition to that of s. 133 of the CA. There were no documents produced to validate the contention that the sums were for his expenses and reimbursements in connection with his services as a director of the company. Neither was there any evidence to show that Dato' Norhisam had followed the applicable procedure on the making of reimbursement claims. By making the payments to himself, Dato' Norhisam had, in essence and substance, granted an unfair preference to himself over the other creditors of the company. The misfeasance was further compounded by the fact that part of the payment was made after the presentation of the petition. As the company was subsequently wound up, the payment was rendered void under s. 223 of the CA in the absence of a validation order by the court. (paras 52-55)

(7) It is an established common law rule in company law that directors of a company have no authority to expend on the funds of the company to pay themselves or any one of their number, unless they are authorised to do so by the company's constitution in its memorandum and articles of association or the payment is approved by the members of the company. Dato' Norhisam could not show any evidence of a shareholder or a board resolution to authorise advances and payments made to himself either as a loan or remuneration or fees for his directorship or reimbursement for director's expenses, thus violating provisions of s. 132(1) and (2). (paras 56, 57 & 61)

(8) The granting of the loans or the making of the advances to three individuals, *ie*, Nurhaslina, Nurhaliza and Mohd Shabri, whom were all closely related to Dato' Norhisam, clearly infringed ss. 133 and 133A of the CA. Part of the payment was paid subsequent to the commencement of the winding up of the company in the absence of a validation order in violation of s. 223 of the CA. Hence, Dato' Norhisam had breached his duties as director and fiduciary of the company. The liquidators had thus shown a clear case justifying the proceeding under ss. 223 and 305 of the CA. (paras 63, 64, 66, 67 & 68)

(9) The payments made to Eye Consolidated in the absence of records of any services whatsoever could not be in the best interest of the company or its creditors. There was a total absence of any documents to support the contention that the advances were loans that had to be repaid by the company. (paras 69 & 70)

(10) The company was already insolvent when virtually all the payments were made. The interest of the creditors of the company displaced that of its members. The instructions and authorisations by Dato' Norhisam for the making of the purported loans and advances or disbursements were not in any manner beneficial to the company. Breaches of director's statutory and fiduciary duties as well as misfeasance under s. 305 had been clearly established. The liquidators were therefore fully entitled to the recovery of all the monies belonging to the company. (paras 72, 74 & 78)

Case(s) referred to:

Cavendish-Bentinck v. Fenn [1886-90] All ER Rep 333 ***(refd)***
Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] 1 Ch 62 ***(refd)***
Dr Mohd Yussof Najar Din & Ors v. Najar Din Chatra & Ors [1997] 3 CLJ Supp 429 HC ***(refd)***
Guinness plc v. Saunders [1990] 2 AC 663 ***(refd)***
Hellard and Anor v. Carvalho [2013] EWHC 2876 ***(refd)***
Hospital Products Ltd v. United States Surgical Corp (1984) 156 CLR 41 ***(refd)***
Hutton v. West Cork Railway Co [1883] 23 Ch D 654 ***(refd)***
In Re George Newman & Co [1895] 1 Ch 674 ***(refd)***
In re Lands Allotment Company [1894] 1 Ch D 616 ***(refd)***
Kawin Industrial Sdn Bhd (in Liquidation) v. Tay Tiong Soong [2009] 1 MLJ 723 ***(refd)***
Linter Group v. Goldberg & Ors [1992] 10 ACLC 739 ***(refd)***
Mahesan v. Malaysian Government Officers Co-Operative Housing Society Ltd [1978] 1 MLJ 149 FC ***(refd)***
Muralidharan Nair Prabhakaran v. Matrix Circle (M) Sdn Bhd [2008] 3 MLJ 388 ***(refd)***
National Land Finance Cooperative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***
Re Neath Harbour Smelting and Rolling Works (1887) 56 LT 727 ***(refd)***
Re Richmond Gate Property Co Ltd [1964] 3 All ER 936 ***(refd)***
Regal (Hastings) Ltd v. Gulliver [1967] 2 AC 134 ***(refd)***
Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(refd)***
Steen and Anor v. Law [1963] 3 All ER 770 ***(refd)***
West Mercia Safetywear Ltd (in Liquidation) v. Dodd [1988] BCLC 250 ***(refd)***
Wong See Yaw & Anor v. Bright Packaging Industry Bhd [2016] 6 CLJ 465 HC ***(refd)***
Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals [2013] 3 CLJ 969 FC ***(refd)***

Legislation referred to:

Companies (Winding-up) Rules 1972, rr. 5(1), (2), 7(2)
Companies Act 1965, ss. 131B, 132(1), (1E), (2), 133, 133A, 223, 226(1)(a), (b), (2)(c), 236(2)(a), 304(1), 305, 307
Evidence Act 1950, s. 114(g)
Rules of Court 2012, O. 18 r. 12, O. 88 r. 2

Other source(s) referred to:
Malaysian Civil Procedure 2015, Vol 1, para 5.2.5

For the petitioner - Koo Yik Soon; M/s Seah Balan Ravi & Co
For the liquidators - Wong CL; M/s Skrine
For the Dato' Norhisam - Ravichandaran; M/s Seah Balan Ravi & Co

Reported by S Barathi

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an application under ss. 305 and 223 of the Companies Act 1965 instituted by a liquidator for various orders against a company director concerning principal allegations of misfeasance and breach of various statutory and fiduciary and other duties, including a consequential order of repayment of company funds.

[2] I heard the application on 16 May 2016 and granted the orders at the conclusion of the proceedings, and stated briefly my principal reasons for the same. In this judgment, I provide the full reasons for my decision.

Key Background Facts

[3] Premised on a petition filed by CIMB Bank Berhad ("the petitioner") on 6 November 2014, Jaring Communications Sdn Bhd ("the company") as the respondent in the proceedings was wound up on 23 April 2015. Its appointed liquidators, Ooi Woon Chee and Mohamed Raslan bin Abdul Rahman ("the liquidators") now seek this court's intervention to declare that one Dato' Norhisam bin Mohamed @ Mohamed Nor ("Dato' Norhisam"), who was at the material time, a director of the company is guilty of misfeasance and breach of fiduciary duty.

[4] Central to this allegation is the misapplication of the funds of the company, on account of Dato' Norhisam having authorised payments of sums of monies belonging to the company, which the liquidators now seek to recover, as follows:

(a) RM23,450,013 to Utusan Printcorp Sdn Bhd ("Utusan Printcorp");

(b) RM1,054,000 to himself;

(c) RM440,000 to Dato' Norhisam's sister, Nurhaslina binti Mohamed Nor ("Nurhaslina");

(d) RM235,000 to another of Dato' Norhisam's sister, Nurhaliza binti Mohamed Nor ("Nurhaliza");

(e) RM249,000 to Mohd Shabri bin Ibrahim ("Mohd Shabri"), his driver; and

(f) RM3,574,272.36 to Eye Consolidated Sdn Bhd ("Eye Consolidated").

[5] The liquidators thus filed the application under ss. 305 and 223 of the Companies Act 1965 ("the CA") and in pursuance of the inherent jurisdiction of this court for orders not only *inter alia* that Dato' Norhisam is guilty of misfeasance and breach of fiduciary and other duties in respect of the alleged misapplication of the money of the company, but also for the consequential order that Dato' Norhisam be required to repay to the liquidators of the company the aforesaid sum of monies amounting in total to RM29,002,285.36 together with interest at the rate of 5% per annum until date of final payment.

Analysis And Findings Of This Court

[6] I shall examine each of the principal points raised by the parties, provide the requisite analysis and then set out my findings in the ensuing parts of this judgment.

Preliminary Objections By Dato' Norhisam

(i) Non-compliance By Petitioner With s. 226(1) And (2)

[7] It is the contention of Dato' Norhisam that the liquidators have failed to show that the petitioner had complied with the mandatory requirements in s. 226(1) and (2) of CA. It is plain from s. 226 that after the winding up order was made, a petitioner is statutorily obliged to comply with the said section within a certain period of time, in default of which, the petitioner shall be guilty of an offence under the CA. Section 226(1) and (2) provides as follows:

> (1) Within seven days after the making of a winding up order the petitioner shall lodge with the Registrar notice of:
>
> (a) the order and its date; and
>
> (b) the name and address of the liquidator.
>
> (2) On the passing and entering of the winding up order the petitioner shall within seven days
>
> (a) lodge an office copy of the order with the Registrar and with the Official Receiver;
>
> (b) cause a copy to be served upon the secretary of the company or upon such other person or in such manner as the Court directs; and
>
> (c) deliver a copy to the liquidator with a statement that the requirements of this subsection have been complied with.

[8] Pursuant to s. 226(1)(b), the petitioner shall also lodge the name and address of the liquidator. It is thus argued that it is only reasonable to state that if the petitioner in the instant case had adhered to this requirement, the liquidators must have given their particulars to the petitioner. Therefore this fact should be within the knowledge of both the liquidators and the

petitioner. Yet the liquidators chose not to disclose the true situation. There is patently no evidence to suggest that the petitioner had lodged the winding up order with the Registrar as provided in s. 226(1)(a) of the CA.

[9] Further, as Dato' Norhisam so maintains, if reference is made to s. 226(2)(c) which provides that the petitioner shall deliver a copy of the winding up order to the liquidators with a statement that the requirements of this subsection have been complied with, the liquidators must have known if the petitioner had indeed delivered the required documents under s. 226(2)(c) of the CA to them. Even if the petitioner failed to comply with s. 226(2)(c), the liquidators, who clearly are officers of the court, owe a duty to disclose such fact to the court.

[10] It was therefore submitted that given the refusal of the liquidators to disclose whether the petitioner had complied with the mandatory requirements of the said sections, this court should invoke s. 114(g) of the Evidence Act 1950 and hold that the petitioner failed to comply with the said sections. As a result, it is the position of Dato' Norhisam that the liquidators' application herein is therefore premature, in reliance on the High Court decision in *Dr Mohd Yussof Najar Din & Ors v. Najar Din Chatra & Ors* [1997] 3 CLJ Supp 429; [1997] MLJU 29 wherein it was held as follows:

> … that the petitioner did not comply with section 226 (1) and (2) of that Act and, in particular, did not within 7 days of the winding up order lodge with the Officer Receiver an Office copy of the order;
>
> …, I assume that the parties consider the order for winding up by the Court, dated 18/3/92, is a nullity.

[11] Dato' Norhisam further submitted that the argument of the liquidators that the aforesaid matter is not relevant to this application by the liquidators and that the petitioner, CIMB, is not the applicant to these proceedings is deemed by Dato' Norhisam as unacceptable and just a lame excuse. This is because even if the petitioner is not the applicant herein, the liquidators must already have access to the petitioner and obtained its consent to file this application. But prior to that, it is clear that after obtaining a winding up order, the petitioner must have performed and completed its statutory duties under s. 226 of the CA before the liquidators came into the picture and initiated any recovery actions. In the performance of their duties, they would be in a position to know whether the petitioner had complied with the said sections.

[12] At first blush, the arguments by Dato' Norhisam appear to have their attraction. But it is observed that the liquidators have as a matter of fact been able to provide the requisite confirmation in exh. "WCL1" to the affidavit of Wong Chee Lin filed on 6 May 2016 which refers to a letter from the solicitors for the petitioner dated 5 May 2016 enclosing the statement pursuant to s. 226 of the Companies Act 1965 dated 29 April 2015, and

addressed to the official receiver. There is crystal clear therefore no issue of any non-compliance on the part of the petitioner with any of the requirements of s. 226(1) and (2) of the CA.

[13] In any event, and more importantly, it is an unfortunate misapprehension of the law if one were to contend that adherence by a petitioner to s. 226(1) and (2) is a *sine qua non* for the institution of an action under s. 305 by a liquidator. The validity of both the appointment of a liquidator and the exercise of his powers are in no way affected by the question of whether or not the petitioner is in compliance with s. 226(1) and (2). Non-compliance may well result in the petitioner being found guilty of an offence, but it does not render the winding-up order a nullity. The case of *Dr Mohd Yussof Najar Din & Ors v. Najar Din Chatra & Ors* [1997] 3 CLJ Supp 429; [1997] MLJU 29 referred to by Dato' Norhisam is no authority for the proposition that non-compliance with s. 226(1) and (2) renders the winding up order void. The High Court in its judgment did not state as such. In fact, a review of that case will readily reveal that the passage quoted by Dato' Norhisam (see above), if reproduced in full stated that the order was deemed a nullity because the High Court found that all relevant parties regarded the company to be in voluntary liquidation instead. The 'non-compliance' with s. 226(1) and (2) in that case is only one factor, in addition to a number of others, that led to the finding that the parties actually proceeded with the liquidation on the basis of a voluntary liquidation.

[14] As such, Dato' Norhisam's preliminary objection concerning the alleged non-compliance by the petitioner with s. 226(1) and (2) is entirely bereft of substance and must necessarily fail.

(ii) Wrong Mode Of Originating Process

[15] It is additionally argued by Dato' Norhisam, in another of his preliminary objection, that when there is an allegation of an intention to defraud, like what he maintained the liquidators are alleging in these proceedings, the law is clear that such proceedings must be begun by a writ action, in accordance with O. 18 r. 12 of the Rules of Court 2012 ("RC 2012") which provides that:

> (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
>
> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and …

[16] Furthermore, Dato' Norhisam relied on the text on *Malaysian Civil Procedure 2015*, vol. I, at para 5/2/5, where it is stated thus:

> Claim based on fraud – A claim involving an allegation of fraud must be begun by writ, as parol evidence is usually required (*Seah Choon Chye v. Saraswathy Devi* [1971] 1 MLJ 112 at 114, HC; *Cheong Kim Hock v. Lin Securities (Pte) (in liq)* [1992] 2 SLR 349, CA Singapore), and ought not to be begun by originating summons, but if it is so begun, it may be continued as if it had been commenced by writ under Order 28 r. 8 ...

[17] It was also submitted by Dato' Norhisam that the averments in the affidavits of the liquidators clearly suggest an allegation of fraud, and that "fraud" and "fraudulent purpose" have been judicially described as akin to a dishonest conduct and an act of misfeasance, as noted in the Court of Appeal decision in *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68.

[18] I do not however agree that reliance on this case, particularly on the passages quoted by Dato' Norhisam in his written submissions, to be justified. The Court of Appeal merely made reference to the grounds of the High Court judgment and arguments raised by parties and in any event focussed its analysis on the essence of the matter before their Lordships in that case, which was the allegation premised not on s. 305, but on s. 304(1) instead, which language clearly includes the elements of fraud. For clarity, s. 304(1) reads:

> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with **intent to defraud creditors of the company** or creditors of any other person or for any fraudulent purpose, the court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs. (emphasis added)

[19] It of course needs no repetition that the instant case involving Dato' Norhisam does not concern s. 304(1). The action brought by the liquidators is primarily premised on s. 305 of the CA. Section 305 is not dependent on the applicant proving fraud against the director in question. There is no reference to "fraud", "intention to defraud" or terms to such effect in s. 305 in any event. It is in my view sufficient to prove that the director had committed misfeasance or acted in breach of his duty to the company such that company directors could be found held liable for their misapplication of the funds of the company without having been proven to have committed fraud (see also *In re Lands Allotment Company* [1894] 1 Ch D 616).

[20] The liquidators in the instant application need only prove that Dato' Norhisam is guilty of misfeasance and breach of his fiduciary and other duties to the company by having made many disbursements and advances to

the various parties I have identified earlier. The liquidators do not have to prove fraud. In fact, the liquidators did not even aver there was fraud or fraudulent conduct against Dato' Norhisam in their relevant affidavits.

[21] In addition, of no less significance procedurally, O. 88 r. 2 of the RC 2012 now stipulates thus:

> Except for the proceedings specified in Appendix C relating to the winding up of companies and capital reduction under the (Companies) Act, proceedings under the Act shall be commenced by originating summons.

[22] The summons herein therefore represents the proper procedure. As correctly highlighted by the liquidators, this is further supplanted by the Companies (Winding-up) Rules 1972, in particular r. 5(2) which states that applications other than those mentioned in r. 5(1) such as petitions and s. 307, shall be heard and determined in chambers, which according to r. 7(2) shall be made by way of summons.

[23] It can be safely stated that s. 305 of the CA provides what can be regarded as a summary mode in the pursuit of rights of the company, which has since been wound up, against a miscreant officer of the company, usually its director, who is responsible for injuring the interest of the company, by his conduct which invariably tantamount to a breach of duty by the officer, resulting in loss to the company.

[24] It is apposite that I now reproduce s. 305 of the CA which reads as follows:

> (1) If in the course of winding up it appears that any person who has taken part in the formation or promotion of the company or any past or present liquidator or officer has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct of that person, liquidator or officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.
>
> (2) This section shall extend and apply to and in respect of the receipt of any money or property by any officer of the company during the two years preceding the commencement of the winding up whether by way of salary or otherwise appearing to the Court to be unfair or unjust to other members of the company.
>
> (3) This section shall have effect notwithstanding that the offence is one for which the offender is criminally liable.

[25] Thus, pursuant to s. 305, if in the course of winding up it appears that any past or present officer has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any misfeasance or breach of trust or duty in relation to the company, the court may on the application of the liquidator examine into the conduct of that person and compel him to repay or restore the money or property or any part thereof with interest or to contribute such sum to the company by compensation in respect of the misapplication as the court thinks just.

[26] Section 305 is referred to as a misfeasance action by the High Court in *Muralidharan Nair a/l Prabhakaran v. Matrix Circle (M) Sdn Bhd* [2008] 3 MLJ 388 in which case action was also commenced by way of summons in the winding up proceedings. I also agree with the submissions made by the liquidators that similar position prevails under the common law as shown by English cases such as *In re George Newman & Co* [1895] 1 Ch 674 and *Hellard and Anor v. Carvalho* [2013] EWHC 2876.

[27] In addition, at the same time there are no real, credible or genuine disputes of fact to justify this court to consider converting this application into a writ action. In my view, this application involves primarily a matter of construction of the various documents and other correspondences, and thus could be adequately dealt with by affidavit evidence. The originating summons does not involve substantial dispute of fact and in any event it is trite rule of procedure that parties have the right to apply to cross-examine any deponent to an affidavit.

[28] A close scrutiny of the substance of this application and the case of Dato' Norhisam will readily show that the allegations made by the liquidators against the former are patently specific and straightforward, and as can be further seen later in this judgment, neither has Dato Norhisam proffered any grounds or evidence in any of his affidavits in response, that can meaningfully be characterised as constituting an effective riposte to dispute any of the said allegations of breaches of fiduciary duties and misfeasance against him herein.

[29] I thus apply the principle adopted in the Federal Court decision of *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 where Salleh Abas CJ (Malaya) (as he then was) stated the following which is of practical relevance to the instant case:

> Counsel for the appellants objected to the respondents taking the proceedings by an originating summons instead of by a writ. He argued that there are matters of credibility of witnesses and issues of facts which could only be decided by oral evidence instead of by sworn affidavits. With respect, we disagree with the submission. The issue involved in this case is purely a matter of construction of the sale and purchase agreement between the parties. No other evidence is needed to determine the issue than the massive correspondence that passed between them and their solicitors. We think that the learned Judge was right in holding that the

> issue can be decided on the basis of the documents exhibited in Court together with the undisputed facts disclosed and that there are no issues relevant to the case which require evidence to be called at a trial. We would further add that there is nothing to prevent the appellants from cross-examining Haji Ahmad Roose bin Haji Mohd Ali if they were not happy with his affidavits. In this case the appellants surely had the opportunity to cross-examine him, but they did not avail themselves of it and let this opportunity to pass by. We are therefore of the view that the procedural objection raised by the appellants had no substance.

[30] I can do no better than follow the approach taken by the Federal Court in that case. Therefore my decision is that in the instant application, for the myriad of reasons I described above, the argument that the application should have been properly commenced by way of a writ is well and truly devoid of merit. There is no necessity to convert this summons into a writ action.

(iii) Other Objections

[31] For completeness, I shall also mention briefly the three other preliminary objections raised by Dato' Norhisam even though these appear to have been conceded by him in his written submissions in reply. First, on the objection that the liquidators had not provided consent for Dato' Norhisam to affirm his affidavit on behalf of the company herein, I have no hesitation in holding that this is entirely bereft of any substance. Surely the consent of the liquidators is not necessary for Dato' Norhisam to affirm his own affidavit because the affidavits affirmed by Dato' Norhisam were manifestly on his own behalf in the sense of his individual and personal capacity, and this is done precisely for the purpose of responding to the allegations of misfeasance and breach of fiduciary duty levelled against him by the liquidators. These allegations are not made against the company which would have otherwise require the involvement of the liquidators. The objection raised by Dato' Norhisam is also doubly flawed since the action against him must also necessarily be instituted by the liquidators in the performance of their duties following the making of the winding up order against the company.

[32] Secondly, in connection with the preliminary objection on the necessity for the liquidators to obtain leave of court to bring this action under s. 305 of the CA 1965, I cannot but agree with the stance taken by the liquidators which in any event is so clearly the position in law, in that the liquidators are fully entitled to exercise their powers under s. 236(2)(a) which provides as follows:

> (2) The liquidator may:
>
> (a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

[33] It is thus perfectly well within the powers of the liquidators to have instituted this action on behalf of the company against a director of the company, in this case, Dato' Norhisam, who at all material times was a director of the company and more relevantly was a director when the company was wound up, and in turn therefore plainly falls within the scope of s. 305 of the CA.

[34] Thirdly, a preliminary objection was raised in that the action herein constitutes a duplicity of proceedings *vis-à-vis* the recovery actions by the liquidators against the parties who are alleged to have received the funds of the company. I find the objection to be entirely misconceived. It cannot be the law that when a director in violation of his statutory and fiduciary duty diverts company funds to a third party, an action to sue the director for the breach, and another proceeding against the third party for the return of the funds amount to a duplicity of proceedings. This is only logical and more fundamentally accords with the sense of justice provided there is no double recovery. There is no basis to even suggest that there is any form of double recovery on the part of either the liquidators or the company in the instant application.

[35] It is worthy of mention that Dato' Norhisam appeared to have given more emphasis in his affidavits and written submissions on highlighting his arguments concerning the preliminary objections, but very much less on responding to the allegations made by the liquidators on the specific advances. I will consider these next.

(a) RM23,450,013 To Utusan Printcorp Sdn Bhd ("Utusan Printcorp")

[36] It is difficult to appreciate in what manner could the advances and payments amounting to RM23,450.013 to Utusan Printcorp by the company as authorised by Dato' Norhisam be considered to have been made in the interest of the company. His contention that the said amount, made up of a series of transactions constituted an investment by the company in Utusan Printcorp which would in turn remit the profits to the company is in my view, far-fetched, unsubstantiated and cannot be accepted.

[37] There is a total absence of any documentary evidence, to name an obvious one such as a board resolution which could support the assertion that the company agreed to invest or for any reason, provide funds to Utusan Printcorp. It is true that there are resolutions stating that these advances of sums of monies by the company were in the nature of short-term loans, for a tenure of not more than three months. Yet there is no evidence of any repayment made by Utusan Printcorp.

[38] In what could probably be considered the most glaring facet of this already brazen situation is that nor could it be shown that there was even any contractual document governing the relationship between the company and

Utusan Printcorp in respect of the purported investment or short term loan that any responsible board of directors should rightfully be concerned about before committing the company they serve into any business and credit arrangements. That alone in my view justifies a finding that the director in question had breached s. 132(1) and (2) of the CA, in turn providing the requisite basis to find him guilty of misfeasance under s. 305 of the CA (see further below).

[39] Neither was there any form of security granted to protect the company, whose interest appeared to be the least considered, if at all. I further agree with the submission of the liquidators that even if the advances were indeed made to the company's own sole shareholder, this still does change the fact that the reasons for such payments were wholly unjustified. A director's duty is owed to the company it serves, not to any other entity, its own holding company notwithstanding. This position is well-established under the law (see the Australian case decided by the Supreme Court of Victoria of *Linter Group v. Goldberg & Ors* [1992] 10 ACLC 739).

[40] This is not to mention the absence of other no less important pre investment-related documents such as feasibility studies and expert reports to determine the viability of the purported business venture. It is manifestly not in the interest of the company for such large sums of monies to channelled or invested to Utusan Printcorp, and neither did Dato' Norhisam furnish any documentary evidence to corroborate his assertion that these advances were lawfully made by the company.

[41] The affidavits affirmed by Dato' Norhisam did contain several averments on various contracts, mainly shares sale and purchase agreements, purportedly entered into by Utusan Printcorp or its other subsidiaries and with other third parties. But these transactions, being at least one step removed from the company, do not demonstrate in what manner the company could benefit from the advances to Utusan Printcorp. It is to be noted that Dato' Norhisam could list out these agreements purportedly involving Utusan Printcorp, but could not mention, let alone produce a single contract governing the advances or flow of funds, entered into between the company and Utusan Printcorp for such a large amount, and given on unsecured basis to boot.

[42] I should add that the reason why such agreements were known to Dato' Norhisam is that he was also a director of Utusan Printcorp at the material time. Despite his status as a common director, from the perspective of the company, it has every legal right to not only expect, but also demand that Dato' Norhisam, as a director of the company, to exercise his powers in the interest of the company. In the event that his appointment to the board of the company was nominated by Utusan Printcorp, it is also plain under

s. 132(1E) of the CA, that even a nominee director must give priority to the interest of the company he serves. This, based on the affidavit evidence of the liquidators, largely unchallenged in any credible fashion, appears quite plainly not to be the case.

[43] As if these facts are not already sufficiently troubling, it is observed that the financial health and state of solvency of the company at the material time itself ought not to have been amenable to any further outflow of funds from the company. There was a significant payment in the amount of RM1,180,000 made to Utusan Printcorp after the presentation of the winding up petition against the company (hence the commencement of winding up), in possible violation of s. 223 of the CA, rendering the same to be void. Section 223 reads as follows:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[44] The law as encapsulated in s. 223 is clear in that upon the presentation of a winding up petition, a company cannot without the order of the court dispose of its property in whatever form and by whatever means. This is to prevent the improper dissipation of the company's assets before the winding up petition is heard and determined. In the instant case, the winding up petition was presented on 6 November 2014 by the petitioner and as the key director of the company, Dato' Norhisam must surely have been aware that the petition had been presented. Yet he still deemed it proper for various payments be made post the date of the petition, and there is no evidence that any of such payments has been validated by the courts. As such, it is clear that all the payments made after the commencement of winding up were void by virtue of s. 223 of the CA.

[45] A transgression of s. 223 of the CA alone is sufficient basis to premise an action against the miscreant director for misfeasance under s. 305, for which the liability of Dato' Norhisam there can be no doubt. Action may thus be taken against him for being responsible for making the void payments (see *Re Neath Harbour Smelting and Rolling Works* (1887) 56 LT 727).

[46] I am aware that s. 223, despite its wordings, does not shut out *bona fide* transactions. The Federal Court in *Wong Wee Kheong & Anor v. Daya Bersama Sdn Bhd & Other Appeals* [2013] 3 CLJ 969 had affirmed that a validation order could be considered even after a winding up order has been granted based on two broad considerations, namely, (a) if the transaction(s) are beneficial to the general body of creditors; or (b) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned. Dato' Norhisam has shown neither. But I should also add neither is there any application for any validation order to start with.

[47] The financial statements of the company recorded losses amounting to RM28,650,454 in the financial year ("FY") ended 2012, RM19,805,706 for FY 2013, and RM25,556,925 for FY 2014. The aggregate total of these amount is even greater than half of the value of the total current assets of the company. The withdrawals of such a staggering amount out of the company cannot even remotely be justified to have been on the basis that the advances and payments were for the benefit of the company. The company has even filed an action seeking repayment of the advances from Utusan Printcorp but the latter itself was wound up not more than six months subsequent to the winding up of the company. And unsurprisingly, the liquidators have averred that the company does not expect to be able to recover the said advances even though it has filed its proof of debts with the liquidator of Utusan Printcorp.

[48] I should also add that nor would I consider Dato' Norhisam could avail himself of the argument that the disbursements and advances were protected by virtue of the business judgment rule under s. 131B of the CA. Not that such an argument was actually made, or even implied in the first place. I suspect it must even therefore have been thought by Dato' Norhisam himself that if made, it would have been far too incredulous an argument to warrant any serious consideration. I think it would suffice if reference be made to the following statement made by the English High Court in its decision in the case of *Charterbridge Corporation Ltd v. Lloyds Bank Ltd* [1970] 1 Ch 62:

> The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

[49] It has not escaped my attention that the fact that Dato' Norhisam was a common director of the payer and the payee of the funds of the company signifies yet another concern on whether there was a proper exercise of director's powers in the instant case. There is clear conflict of interest situation arising from Dato' Norhisam's position on the boards of both entities. This invidious position of conflict appeared to have been conveniently resolved in favour of Utusan Printcorp in an overwhelming fashion, given the size of the total funds transferred by the company to Utusan Printcorp, despite the obvious concerns with especially the financial health of the company at the material time. This conflict position has resulted in what could also be said to be a breach of s. 132(2) of the CA which spells out yet another fundamental requirement against the improper use of the company's property for the benefit of another party to the detriment of the paying company.

[50] The facts concerning the advances largely uncontroverted, and thus supporting the case for the liquidators, Dato' Norhisam has however not successfully been able to counter the same, given his failure to make available any credible evidence other than bare assertions that these were made in the interest of the company. Nor was any explanation given for the absence of such evidence. Accordingly, I have no hesitation in holding that the liquidators have clearly established misapplication of company funds, misfeasance and breach of directors' fiduciary and statutory duties on the part of Dato' Norhisam, such as primarily under s. 132(1) and sub-s. (2) of the CA which stipulates the most basic requirement that a director shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company he serves, and not use the property of the company to its own detriment. This more than amply supports the invocation of s. 305 on account of such breaches of duties committed by Dato' Norhisam.

(b) RM1,054,000 To Dato' Norhisam Himself

[51] It cannot be denied, and indeed it was not disputed by Dato' Norhisam that it was so very clearly stated in the payment advice which accompanied each and every one of the cheques disbursing monies to him that the said sums were for "Advances as required by CEO."

[52] The evidence is thus glaring in its specificity and thus inescapable in its repercussions. The act of authorising advances and purported loans made to himself is blatant infringement of his statutory and fiduciary duties, in addition to that of s. 133 of the CA 1965 which generally prohibits the granting of loans by a company to its own directors, a major exception being that the same is approved by the general meeting of its shareholders (which is not shown herein to be the case in any event).

[53] It was averred in his affidavits that such sums were for his expenses and reimbursements in connection with his services as a director of the company. But no documents such as board resolutions or claims forms had been produced to validate such contention. Under s. 133, the only justification for such large sums of monies being disbursed to himself as a director would be for any expenditure incurred for the purposes of the company or if there was a scheme approved for the company to make loans to the employees of the company. Neither situation concerns the instant case. As it transpired, there is no evidence that the purported loans and advances to the director were made for the purposes of any expenditure incurred. There is also no evidence that any claims with the relevant receipts and supporting documents were made or submitted by Dato' Norhisam. Nor is there any evidence to show whether Dato' Norhisam had followed the applicable procedure on the making of reimbursement claims, and no documents have been produced to such effect to support his assertion, despite the sizeable sums of monies in the tens of thousands, with the minimum disbursement being RM10,000.

[54] It could also be stated that by making such payments to himself, Dato' Norhisam had in essence and substance granted an unfair preference to himself over the other creditors of the company. This is also another aspect of a breach of his fiduciary duty as a director of the company. In the case of *Kawin Industrial Sdn Bhd (in Liquidation) v. Tay Tiong Soong* [2009] 1 MLJ 723 it was held that a director's act of making a payment of RM115,000 to himself compromised the financial position of the company in liquidation by depriving the company or otherwise utilising the said sum to pay off its trade creditors, and that this constituted a breach of duty under s. 132 of the CA and tantamount to a misfeasance. The facts in the instant case are not much different to permit, if not compel me to arrive at the same conclusion.

[55] But the misfeasance in the instant case is further compounded by the fact that part of the payments, RM505,000, to be specific, was even made after the presentation of the petition, and as the company was subsequently wound up, rendering the same to be void under s. 223 in the absence of a validation order by the court. To say that the extent and severity of the violations are quite shocking is thus an understatement.

[56] Quite apart from the prohibition of loans by company to its directors, it is a well-established common law rule in company law that directors of a company have no authority to expend on the funds of the company to pay themselves or any one of their number, unless they are authorised to do so by the company's constitution in its memorandum & articles of association or the payment is approved by the members of the company (see *In Re George Newman And Co* [1895] 1 Ch 674). Bowen LJ in *Hutton v. West Cork Railway Co* [1883] 23 Ch D 654 stated as follows:

> A director is not a servant [ie employee]. He is a person who is doing business for the company, but not upon ordinary terms. **It is not implied from the mere fact that he is a director that he is to have right to be paid for it.** In some companies ... there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. **But if there is no special provision their payment is in the nature of a gratuity.** (emphasis added)

[57] A director of a company therefore does not have a right to be remunerated merely by virtue of his office except as provided by its constitution or approved by its shareholders. In *Re Richmond Gate Property Co Ltd* [1964] 3 All ER 936, it was held that in the absence of any resolution concerning the amount of directors' remuneration passed pursuant to the articles in general meeting prior to the liquidation of the company, the directors were thus not entitled to any remuneration. In *Guinness plc v. Saunders* [1990] 2 AC 663, the articles provided that the remuneration of the director performing services for the company outside the scope of the

ordinary duties of a director was to be determined by the company's board as a whole. The House of Lords held that since no determination had been made by the board, the relevant director was not entitled to any remuneration. The director in question had been given special remuneration by a committee of the board, an act which the committee had no authority to perform. Accordingly, the director had to return the remuneration. The position is similarly applicable in Malaysia (see *Wong See Yaw & Anor v. Bright Packaging Industry Bhd* [2016] 6 CLJ 465). In the instant case, Dato' Norhisam could not show any evidence of a shareholder or a board resolution to authorise advances and payments made to himself, either as a loan or remuneration or fees for his directorship or reimbursement for director's expenses.

[58] This overarching rule on directors' remuneration emanates from the principle that a director stands in a fiduciary relationship *vis-à-vis* the company he serves. Lord Porter in *Regal (Hastings) Ltd v. Gulliver* [1967] 2 AC 134 had this to say:

> Directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form.

[59] In *Hospital Products Ltd v. United States Surgical Corp* (1984) 156 CLR 41, Mason J said thus:

> ... the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect.

[60] It is quite clear that the fiduciary in the instant case, Dato' Norhisam could not be said to have fulfilled the requirements expressed in the above observations.

[61] A number of facets to the requirements governing the discharge of the role of a director as a fiduciary is enacted in the CA, chief amongst which, as mentioned earlier is the most fundamental duty to act in good faith in the best interest of the company under s. 132(1) and the prohibition against improper use of company's property, position, corporate opportunity or competing with the company under s. 132(2). Directors deciding to remunerate themselves in the absence of any authorisation by general meeting or any provision in the articles would clearly be infringing their role as fiduciaries and violate these statutory requirements, risking the penalty of imprisonment upon conviction, and being liable to the return of the secret profits or damages (see for instance the Privy Council's decision in *Mahesan v. Malaysian Government Officers Co-Operative Housing Society Ltd* [1978] 1 MLJ 149).

[62] Accordingly, it is difficult not to conclude that Dato' Norhisam had so clearly infringed various provisions of the CA in connection with the advances and disbursements to himself that he had personally authorised, rendering him guilty of violation of such duties and misfeasance, thus justifying the declarations and orders prayed for by the liquidators of the company in pursuance of ss. 223 and 305 of the CA.

(c) RM440,000 to Dato' Norhisam's sister, Nurhaslina binti Mohamed Nor ("Nurhaslina");

(d) RM235,000 to another of Dato' Norhisam's sister, Nurhaliza binti Mohamed Nor ("Nurhaliza"); and

(e) RM249,000 to Dato' Norhisam's driver, Mohd Shabri bin Ibrahim ("Mohd Shabri")

[63] The granting of the loans or the making of the advances to the three individuals are too glaring not to be legally objectionable, more so they are closely related to Dato' Norhisam. Even if these are indeed loans and advances, at least for the sisters, they are clearly caught by s. 133 which proscribes the making of loans by a company to its director (since Nurhaslina is said to be a director) and by s. 133A which prohibits company loans be given to persons connected with a director of the company. As siblings of Dato' Norhisam, both Nurhaslina and Nurhaliza are deemed under s. 122A of the CA as persons connected with Dato' Norhisam. An exception is where the borrower is an employee of the lending company and the purpose of the loan is to purchase a house in accordance with the company housing loan scheme. Nurhaliza is an employee of the company at the material time, earning a monthly salary of RM3,500, but no averment has been made to state the purpose of the disbursements and advances, whether being in respect of the company housing loan or for any other reasons such as remuneration-related. Yet, sums amounting to RM235,000 were disbursed to her as "advances requested by CEO". Section 133A makes a director who authorises the making of such loans to persons connected to be guilty of an offence. Out of this total sum, some RM105,000 was paid subsequent to the commencement of the winding up of the company in the absence of a validation order in violation of s. 223 of the CA.

[64] And of course, what more if these disbursements were not even loans (which would at least mean repayment is necessary) in which event, such as in the instant case, they would blatantly be contrary to the proper discharge of Dato' Norhisam's duties as a director and fiduciary of the company, as these could not have been made in the interest of the company, and thus resulting in similar breaches of the law as highlighted in this judgment concerning other advances, at the same time more than amply established the commission of breach of duty and misfeasance on his part against the company under s. 305 of the CA.

[65] Similar observations would apply to the aggregate sum of RM440,000 which had been disbursed to Nurhaslina by way of cheque payments in the tens of thousands, with the lowest amount being RM40,000 and the highest, RM150,000. And again, these disbursements were made on the direction of Dato' Norhisam himself, for it is stated in the payment advice that these are "advances requested from CEO". This is not disputed. Neither is there any real explanation offered by Dato' Norhisam in any of his three affidavits which could properly authorise the making of such advances to either one of his two sisters. The fact that Nurhaslina is said to be a director at the material time exacerbate the situation for no such loans or advances could be lawfully made to a director under s. 133 in the first place which similarly applies to the advances to Dato' Norhisam himself. Nothing worthy of mention has been suggested that could even remotely justify the same to be in any manner conceivably in the interest of the company, or fall within the exceptions of s. 133. It could hardly be, for, out of the said RM440,000 in total, some RM400,000 was in fact paid to Nurhaslina after the commencement of the winding up of the company in breach of s. 223.

[66] Again, there can be no question of a breach of a director's duty to act in the interests of the company he serves, in addition to other related infringements of director's duties. This is thus a clear case of breach of duty and misfeasance under s. 305 of the CA.

[67] Then there is Mohd Shabri, who was Dato' Norhisam's driver, and in whose favour monies belonging to the company of up to RM249,000 had been advanced to. Out of this, some RM115,000 had been paid to Mohd Shabri after the commencement of the winding up of the company, again contrary to the requirements of s. 223 of the CA. It is probably of some considerable disquiet to many that a driver had been paid such a large sums of money belonging to the company; but it is surely of much greater concern to many more that the director in question, being the one who had actually authorised the disbursement of company funds to his own driver has furnished absolutely no reason as to why such payments were made, and not to mention that neither was any evidence given that the monies paid to Mohd Shabri was otherwise used for the benefit of the company.

[68] Advances made to company directors relevant to their role as directors, could in appropriate circumstances be legally valid if they could come within the scope of s. 133 or otherwise approved by the board or the general meeting of the shareholders of the company depending on the governing articles of association of the company (but which is clearly not the case in the instant application). But payments made to family members of or persons connected with the directors are inherently more difficult to justify. They fly in the face of an honest discharge of a director's duties and *prima facie* unlawful especially in the absence of any rational explanation, like in

the instant case. Such payments cannot conceivably on the face of it be construed as being for the benefit of the company. They are on the contrary indicative of a flagrant breach of director's fiduciary duty. It accords with common sense and the essence of justice that such advances are prohibited both under the common law and under statute, specifically under s. 133 since Nurhaslina was also a director, and s. 133A of the CA, in respect of Nurhaliza, in the absence of approval in a general meeting. In the instant case, not only is it not in dispute that there is no such approval for any of the payments made to Dato' Norhisam's two sisters and his driver. More critically, despite the former asserting that these were loans to the three, there are absolutely no documents to substantiate such a claim. Again, the liquidators have shown a clear case justifying their proceeding under ss. 223 and 305 in respect of these various payments and advances.

(f) RM3,574,272.36 To Eye Consolidated Sdn Bhd ("Eye Consolidated")

[69] It is similarly unclear why the company had made payments amounting to RM3,574,272.36 to Eye Consolidated. There were no records of any services whatsoever rendered by the latter to the former, despite some (but not all) of the various cheques for payments having been accompanied by documents stating "consultant for Jaring Restructuring 2014", and "request by CEO". The entire aggregate sum of RM3,574,272.36 paid by the company on the authority of Dato' Norhisam was even effected post the commencement of the winding up of the company, in violation of s. 223. Again, no valid reasons were offered to explain why he had asked for these disbursements made to Eye Consolidated, let alone to suggest that the same was used for the benefit of the company. It is noted that the liquidators have in fact obtained judgment for the said sum of RM3,574,272.36 against Eye Consolidated on 14 January 2016, in an action uncontested by Eye Consolidated.

[70] There was a total absence of any documents to support the contention that these advances were actually loans which had to be repaid to the company. No loan agreements had been shown to have ever been signed to bind Eye Consolidated contractually, not to mention, by definition, the absence of any security. It is a principle which has common sense and sense of justice written all over it that the making of a loan by a company without security cannot be in the best interest of the company or its creditors (see *Steen and Anor v. Law* [1963] 3 All ER 770).

Other Observations

[71] It is patently plain and clear as daylight that none of these loans or advances could have been for the benefit of the company, even more so the fact that none of these loans would likely be recoverable by the liquidators of the company. The extent of the breach of his statutory and fiduciary duties

A cannot be emphasised enough. There is absolutely no question that a breach of duty and misfeasance had indeed been committed, not once but many times over, considering the extent and repeated and frequent nature of the transgressions *vis-a-vis* the various advances and payments.

B **[72]** Another important aspect of the facts of this instant application is that the company was already insolvent (prior to the presentation of winding up petition and the making of a winding up order against the company) when virtually all the payments were made. A significant consequence of this state of affairs would be that the interest of the creditors of the company displaces that of its members. In insolvency, the interests of the creditors are C paramount. I agree that the case of *West Mercia Safetywear Ltd (in Liquidation) v. Dodd* [1988] BCLC 250 referred to by the liquidators is of relevance, where it was ruled that upon the insolvency of a company, the interests of the creditors would override those of the shareholders since from that point, the company's assets belonged, in a practical sense, to the creditors. In that case, D since West Mercia was known by the director in question to be insolvent when he procured some £4,000 to be transferred from its account to a third party, the transfer was held to be a fraudulent preference which had been undertaken purely to relieve the said director of personal liability under his guarantee, in total disregard for the interest of the general body of the E creditors of West Mercia. Accordingly, the court granted the declaration sought by the liquidator that the director was guilty of misfeasance and breach of trust and that further he be ordered to repay the £4,000 transferred to the third party.

[73] I thus agreed with the submissions of the liquidators that the granting F of the purported loans and advances occurred when the company was insolvent and suffering losses on an annual basis. The company was at that time in debt, having owed EPF more than RM3 million from July 2014 to April 2015 and a further RM74,000 to SOCSO and had also deducted from its employees' income tax in the sum of RM44,000 without paying the G Inland Revenue Board.

[74] It is therefore not in doubt that the many instructions or authorisations by Dato' Norhisam for the making of the purported loans and advances or disbursements to each of Utusan Printcorp, himself, Nurhaslina, Nurhaliza, Mohd Shabri and Eye Consolidated during the time when the company was H insolvent, or of doubtful solvency, none of which demonstrated to be in any manner beneficial to the company, constituted a breach of his fiduciary duties to the creditors of the company, and at the same time ignobly adds to the already staggering list of breaches of his statutory and fiduciary duties against the company he was supposed to serve.

I

[75] The liquidators pointed out in their written submissions that proof of loss to the company is a *sine qua non* for an action for misfeasance and breach of duty. In *Cavendish-Bentinck v. Fenn* [1886-90] All ER Rep 333, Lord Herschel stated thus:

> A breach of duty such as is suggested would be a misfeasance, giving rise to an application under s. 165 such an application could only succeed where it could be shown that the breach of duty resulted in loss to the funds and assets of the company.

[76] There is no denying that the company had manifestly suffered losses on account of the many and various payments made on the authorisation of Dato' Norhisam, in favour of Utusan Printcorp, Eye Consolidated, his two sisters, his driver, and to himself, totalling an aggregate sum of RM29,002,285.36, in the total absence of any form of benefit accruing to the company.

[77] Quite apart from s. 305, even the interplay between ss. 133 (and 133A) and 223 of the CA in the instant application would require the payment of the relevant sums back to the company. For argument's sake, in the very unlikely scenario that a validation order could be obtained to render such payments not void, they would still have remained as advances in the nature of loans (as alleged) in violation of s. 133 (in respect of advances to himself and Nurhaslina, a fellow director) and s. 133A (in respect of Nurhaliza). Both these sections expressly stipulate that nothing in the respective Sections shall operate to prevent the company from recovering the amount of any loan given contrary to the said sections.

[78] The aforesaid advances and payments, authorised by Dato' Norhisam as a director of the company give rise to an egregious compendium of a number of irregularities in the nature of transgression against the well-entrenched statutory and fiduciary duties of company directors. The list is inglorious in its extent and plainly indefensible for all intents and purposes. It cannot be shown that any of the disbursements or advances was for the benefit of the company. It has been shown that they involve various breaches of s. 132(1) as well as 132(2), what more those brazenly made to closely related individuals. All such payments effectively constituted preference to the detriment of the creditors of the company. Part of the advances to each of the five receiving parties were made after the commencement of winding up of the company, rendering the same void under s. 223 and all of the disbursements were made when the company was already in doubtful solvency. If these were loans, they are made against the provisions of ss. 133 and 133A. Breaches of a director's statutory and fiduciary duties as well as misfeasance under s. 305 has clearly been established on the basis of each of the individual transgressions and in any event overwhelmingly demonstrated by the list of violations of his statutory and fiduciary duties.

[79] As such, given the overwhelming preponderance of affidavit evidence which establishes breaches of duty on the part of Dato' Norhisam, in pursuance of s. 305, the liquidators are therefore fully entitled to the recovery to all the monies belonging to the company which have been unlawfully and wrongfully granted and misapplied by virtue of none other than Dato' Norhisam's own breach of fiduciary and statutory duty, and misfeasance. Other than what I would consider as self-serving afterthoughts unsupported by any contemporaneous documentary evidence, the averments by Dato' Norhisam did not present a real or credible answer at even half explaining the reasons for the various payments and advances. They were doubtless not undertaken for the commercial benefit of the company, and could have even played a not insignificant part in the eventual winding up of the company under his care as a director. It is equally clear that advances and disbursements made after the commencement of winding up are void, not only in the absence of a validation order under s. 223, but also given the facts that have shown little basis for such payments, if at all.

Conclusion

[80] On the premise of the foregoing reasons, involving a myriad of breaches of director's duties as a fiduciary and under the CA, as well as misfeasance, in respect of the misapplication of the funds of the company, for which Dato' Norhisam is guilty of for having committed the same, I find that the case for the recovery under s. 305 of the entirety of the sums so disbursed, totalling RM29,002,285 (minus the sum of RM38,500 which the liquidators conceded was rightfully his salary), from and against him, to have been on a balance of probabilities clearly and successfully made out by the liquidators. I therefore allow encl. 79 with costs.